No. 15647

United States Court of Appeals

FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

I. JURISDICTION

This is an appeal from a conviction in the United States District Court for the Western District of Washington, Northern Division, of an offense under the Universal Military Training and Service Act, Title 50 U.S.C. Appendix § 462. The District Court had

jurisdiction under Title 18 U.S.C. § 3231. This Court has jurisdiction of this appeal by reason of the provisions of Title 18 U.S.C. § 3772 and Rule 37 of the Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

Appellant was convicted of willfully refusing to submit to induction in the armed forces of the United States. He admits the refusal but denies that he was classified for induction in accord with due process of law. He also claims that the court below should be reversed because it did not cause Federal Bureau of Investigation reports to be produced and used at the trial.

In this brief references to the copy of the Selective Service file which is submitted as the only exhibit will be followed by "Ex." and the page number. That page number of the exhibit will be the handwritten figure which appears at the lower right corner of each of the papers in it.

Appellant registered with the Selective Service System on October 17, 1951 (Ex. 95). He stated that he was a regularly serving minister of religion (Ex. 97). On November 13, 1951, he filed a special form for conscientious objectors in which he stated among other things that "the only force I believe in is

immediate protection of myself and my friends, and that force which is commanded by God" (Ex. 85, 86).

Appellant appeared before his local draft board on December 11, 1951. A brief record of that appearance was made. It shows that he was queried as to whether he would protect himself if the country was invaded and gave the response, " will not . . . I would not kill." That record further shows that the board determined that it had not been convinced that registrant was a conscientious objector and he was therefore classified 1-A (Ex. 84).

The minutes of actions by local and appeal boards (Ex. 102) shows an additional entry regarding the December 11, 1951, personal appearance of the appellant. It indicates that the registrant requested a 1-O classification, which was denied because he was unable to convince the board that he qualified for such classification (Ex. 102). He was classified 1-A by a board vote of 2-0 and filed an administrative appeal. The classification was affirmed by unanimous vote of the Appeal Board (Ex. 102).

The Selective Service file was then referred to the Department of Justice for advisory opinion, pursuant to Section 6(j) of the Act (50 U.S.C. App. § 456(j)). (Ex. 76-77). The registrant was accorded a hearing before a Special Hearing Officer of the Department

of Justice. At that hearing appellant stated that he could not conscientiously perform noncombatant training and services in the armed forces of the United States because that would interfere with his religious activity and because the teachings of his religion required that he should remain unspotted from the world. The hearing officer recommended classification 1-A-O. The Department of Justice concurred in that recommendation and so advised the Appeal Board (Ex. 62-63).

The Appeal Board reconsidered the case after receiving the Department of Justice recommendation and several affidavits filed by the appellant. By unanimous vote it reclassified the appellant to Class 1-A-O (Ex. 63-73, 102).

The registrant was then requested to appear before his Local Board and made such an appearance on October 12, 1954. He was orally asked certain questions. The questions and answers were reduced to writing and signed by him after the interview. They showed that appellant was opposed to the use of force to protect his country but believed that force could be used to protect his home, his friends, his religious brethren, and that armed force was proper to defend his family. He stated that his conscientious objection was based primarily on his desire to preach and that

he was not willing to perform civilian work in the national interest for a period of twenty-four months because "The Bible says we shall not become friends of the World. Friendship with the World is enmity with God" (Ex. 54). The Local Board did not change the classification as a result of this interview (Ex. 102).

Classification of the registrant was reconsidered by his Local Board on April 19, 1955, because of a change in the regulations. The board again classified him, by a 2-0 vote, in Class 1-A-O (Ex. 102). He did not appeal from that classification or request a further oral interview with the board, but an appeal was taken by the Government appeal agent (Ex. 102).

The matter was again referred to the Department of Justice for the special hearing required by the Act and appellant ultimately appeared before another hearing officer of the Department of Justice. That second hearing officer also recommended classification as 1-A-O (Ex. 36). The Department of Justice again recommended to the Appeal Board that the classification be 1-A-O (Ex. 35-37).

While the matter was being considered by the Department of Justice appellant submitted information concerning the dependency of his mother but the Local

Board determined that such information did not warrant a change in classification (Ex. 40).

All of the information above referred to was available to the Appeal Board on June 19, 1956 when it made the final classification. In addition, it had a letter from the registrant under date of June 11, 1956, reading in part as follows:

> "My claim for exemption as a Conscientious Objector is based solely on the fact that I am a regularly ordained minister of the Gospel." (Ex. 32).

III. SUMMARY OF ARGUMENT

Appellant had the burden of establishing to the satisfaction of the draft officials that he was conscientiously opposed on religious grounds to noncombatant service in the armed forces of the United States. He failed to sustain that burden. On the contrary, in proceedings lasting approximately five years and involving hearings before two Special Hearing Officers of the Department of Justice, recommendations of other agents of the Department of Justice, appearances before his Local Board, and repeated votes of the members of his Local Board and of the Appeal Board, he was unable to persuade any one of those officials that he did have such conscientious objection to noncombatant service.

The classification did not deprive appellant of due process of law and may not be reviewed in the courts.

The court below quashed a subpoena duces tecum which would have required the production of confidential Federal Bureau of Investigation reports for use at the trial. The court was correct because the confidential reports of the Federal Bureau of Investigation have a special status in conscientious objector cases. They are replaced for all purposes in connection with the classification of alleged conscientious objectors by the summaries mandated by the decision of the Supreme Court in *United States* v. *Nugent*, 346 U.S. 1 (1953).

IV. ARGUMENT

POINT ONE

The Classification by the Appeal Board Was Proper and Not Subject to Review

Section 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 451), provides in part that:

> ". . . an adequate armed strength must be achieved and maintained to insure the security of this Nation . . . .
>
> * * * * * * * *
>
> "that in a free society the obligations and privileges of serving in the armed forces and the re-

> serve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 4(a) of the Act (50 U.S.C. App. § 454(a)), with certain very limited exceptions, makes liable for training and service in the armed forces of the United States every male person within certain age groups who is a citizen of the United States and every male alien admitted for permanent residence in the United States.

In view of the universal nature of the obligation to perform military service, only those persons would be placed in exempt or deferred classifications who clearly belong in those classifications. This was recognized by the President of the United States when, in accordance with Section 10(b)(1) of the Act (50 U.S.C. App. § 460), he prescribed the Selective Service Regulations.

Section 1622.10 of the Selective Service Regulations (32 C.F.R. § 1622.10), provides:

> "*Class 1-A: Available for military service.* In Class 1-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class."

Section 1622.1(c) of those Regulations (32 C.F.R. 1622.1(c)) contains the following sentence:

> "Each registrant will be considered as available for military service *until his eligibility for* deferment or *exemption from military service is clearly established to the satisfaction of the local board.*" (Emphasis supplied.)

See also, Section 1623.2 of the Regulations (32 C.F.R. 1623.2) in which it is stated:

> "Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed * * *."

Section 10 (b) (3) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 460 (b) (3)), authorizes the President of the United States to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered, together with such other duties as may be assigned. It is further provided in the same section:

> "Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President,

have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. *The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * * The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President.*" (Emphasis supplied.)

With respect to the above language, the Supreme Court of the United States in the case of *Dickinson* v. *United States*, 346 U.S. 389, 394, (1953) said:

"At the outset it is important to underline an elemental feature of this case. The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders. Rather the Act provides, as did the 1917 and 1940 Conscription Acts before it, that classification orders by selective service authority shall be 'final'. However, in *Estep* v. *United States*, 327 U.S. 114, (1946), a case arising under the 1940 Act, this Court said, at 122-123: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The

question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant'."

In *Cox* v. *United States*, 332 U.S. 442, 453, (1947) the Supreme Court stated:

"Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable 'only if there is no basis in fact for the classification.' *Estep* v. *United States*, *supra*, 122. Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders."

In the case of *Swaczyk* v. *United States*, 156 F. 2d 17, 19 (1st Cir. 1946), cert. denied 329 U.S. 726, it was stated:

" 'It should be remembered that immunity from military service arises not as a matter of constitutional grant, but by virtue of Congressional deference to conscientious religious views. Rase v. United States, 6 Cir., 129 F. 2d 204. The burden, therefore, is not upon the government, but upon one claiming exemption to bring himself clearly within the excepted class.' Seele v. United States, 8 Cir., 133 F. 2d 1015, at page 1022.

"Unless, then, the registrant can establish the complete lack of a factual basis for his classification, or, perhaps, some controlling bias or prejudice against him, his defense is ineffectual . . . ."

The jurisdictional requirement of a basis in fact for the determination by the Appeal Board is a vastly different thing than the usual substantial evidence standard applied to administrative decisions. The draft board, by the necessities of the situation, must read the registrant's mind.

Anything giving a fair clue to the registrant's true state of mind constitutes a basis in fact.

White v. *United States*, 215 F. 2d 782 (9th Cir. 1954);

Tomlinson v. *United States*, 216 F. 2d, 12 (9th Cir. 1954).

In *Tomlinson*, this Court stated in part, at page 17, as follows:

> "We note here that the board found that registrant was in fact a conscientious objector. It is evident that the board raised the question: conscientious objector to what? In White v. United States, supra, this court had occasion to point out that a draft board having to do with a claim of conscientious objection, is necessarily called upon to evaluate a mental attitude and a belief. A board or body called upon to determine to what extent and how far an individual's conscientious objections go, may well have great difficulty in coming to a conclusion. Surely the board is not concluded by the mere assertion of the registrant. Attitudes and demeanors which develop at the time of such a person's personal appearance may well be the controlling factors. In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing

> officer. Such a report may furnish the basis in fact which supports the board's action. Kent v. United States, 9 Cir., 207 F. 2d 234, 237; Roberson v. United States, 10 Cir., 208 F. 2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

This Court in the *Tomlinson* case went on to state, page 18, as follows:

> "The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs 'of this world'. True he is conscientiously opposed to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying the 'message' and doing what he chose to call 'ministerial work'. * * * An objection, on religious grounds, to any assignment which would take the registrant away from his missionary activities, is not an objection which the Act recognizes."

It will be noted from the *Tomlinson* and *White* cases referred to above that the Department of Justice recommendations of themselves would constitute a basis in fact to support the classification given this appellant. Two different Department of Justice Hearing Officers made findings on the basis of the entire record including personal observation of the appellant. The respective Hearing Officers concluded that while the appellant is conscientiously opposed to war in any form which involves the taking of human life, that his conscientious objections with respect to noncombatant

training and service is not based upon religious training and belief. One Hearing Officer pointed out that while registrant based his contention that he was a conscientious objector on his abhorrence of killing another human being, he did not claim that the Jehovah's Witness sect taught its members to be conscientious objectors or that there was any rule in that respect. (Jehovah's Witnesses are not necessarily conscientious objectors. Some Jehovah's Witnesses have joined the Army and Navy. Each must make the determination according to his own conscience. See *Gonzales* v. *United States*, 212 F. 2d 71, (6th Cir. 1954) reversed on other grounds 348 U.S. 407). The Department of Justice recommendation dated August 19, 1954, points out that the appellant stated that he principally relied upon the Commandment "Thou Shalt Not Kill" as a basis for his objection to war and the teaching of the Bible to "Love Thy Neighbor As Thyself". The second Department of Justice recommendation dated May 18, 1956, points out that the appellant's statement to the first Hearing Officer that he was conscientiously opposed to noncombatant military training and service was because it would interfere with his ministerial and preaching work.

Registrant confirmed that fact to the Appeal Board just eight days before his final classification

was fixed. In a letter dated June 11, 1956, he stated to the Appeal Board:

> "My claim for exemption as a conscientious objector is based solely on the fact that I am a regularly ordained Minister of the Gospel."

As this Court held in *Tomlinson* v. *United States*, *supra*, the Act does not exempt a registrant from military service because such service would interfere with the ministerial work of a person who is not entitled to exemption from military service because of status as the leader of a religious congregation.

It is argued by appellant that the determination of the appeal board on June 19, 1956, was arbitrary and capricious. Appellant takes the position that his classification as 1-A-O was necessarily a compromise. The only proper classification, according to appellant, would be either 4-E (ministerial), 1-O (complete exemption from all military service), or an outright 1-A.

It is apparent from appellant's brief that there is no real claim that he was entitled to a ministerial classification. A claim to ministerial status would be frivolous in view of the clear showing in Exhibit 1 that appellant was a publisher, or ordinary member of his religious group, as distinguished from the company servant who occupies the position which would be that of a minister within the meaning of Section

16(g)(3) of the Universal Military Training and Service Act (50 U.S.C. App. § 466(g)(3)).

Where then does appellant stand in objecting to what he calls compromise? His only claim, as evidenced by his letter of June 11, 1956, to the appeal board, was that he was entitled to ministerial status. Since he was not within the statutory definition of a regularly or duly ordained minister of religion, on his own argument concerning compromises he should have been classified as 1-A, available for all military duties, combatant and noncombatant, and has no standing to complain that the board excused him from combatant service.

Entirely aside from the fact that such alleged compromise was not prejudicial to appellant, it is to be remembered that there is no reason to speculate that the classification was the result of compromise.

The only classification which resulted in an order for induction was that of June 19, 1956. When the Appeal Board acted on that day it knew the following things which supplied an ample basis in fact for a 1-A-O classification.

1. The members of registrant's Local Board had twice interviewed the registrant, but none became convinced that appellant was entitled to exemption from all military service.

2. Two Hearing Officers of the Department of Justice held hearings at which the registrant attempted to show that he was entitled to such exemption. Both such officers believed that the objection should be sustained as to combatant but not as to noncombatant military service.
3. The Department of Justice had twice recommended that the claim be sustained as to combatant service only.
4. The registrant had shown both to a Hearing Officer and directly to the Appeal Board that his objection to noncombatant service was on a ground that this Court has held is not a valid basis for such an exemption, i.e., such service would interfere with his opportunity to preach the gospel as a lay minister of a religious sect all of whose members are such ministers. (*Tomlinson* v. *United States*, infra).
5. Not even one member or officer of any of the boards and agencies which had considered the claim prior to June 19, 1956, had been persuaded that the registrant should be excused from noncombatant service.

Those facts constituted an even more substantial basis in fact for the June 19, 1956, classification by the appeal board in this case than there was for similar classifications considered by this Court in *Tomlinson* v. *United States*, 216 F. 2d 12, *supra*, and *White* v. *United States*, 215 F. 2d 782, *supra*. In both of those cases this Court confirmed the convictions of Class 1-A-O registrants.

In classifying appellant in 1-A-O the board was determining a state of mind rather than making a

finding as to objective facts. There having been a basis in fact for its determination, the correctness of its decision was not reviewable in the court below. The board may, or may not, have correctly read the mind of the registrant, but the burden was upon him to convince the Selective Service officials of the sincerity of his claim for exemption under the statute.

He failed and may not now reargue that claim in another forum by the simple expedient of relabeling it as "due process of law."

POINT TWO

The Court Below Correctly Ruled That the Appelant Was Not Entitled to Have the Original FBI Reports at the Trial for the Purpose of Comparison of the Resume with the Reports

In urging that there was reversible error of the trial court in refusing defendant the right to use the FBI reports at the trial, appellant is asking this Court to overrule its decisions in *White* v. *United States*, 215 F. 2d 782, *supra*, certiorari denied 348 U.S. 970 (1955), and *Kaline* v. *United States*, 235 F. 2d 54 (1956).

In *White* v. *United States*, *supra*, this Court held, at page 790:

> "We see nothing in the requirements of the statute or in the demands of due process or in what was decided in the Nugent case which would require that any portion of an FBI investigation undertaken for these purposes should be made available to the registrant either before the hearing officer or at the time of his prosecution for failure to submit to induction. All of the practical considerations relating to a probation report which were alluded to in Elder v. United States, footnote 11, supra, and in Williams v. People of State of New York, supra, apply here as reasons for denying similar access to the FBI report."

That determination was confirmed in the *Kaline* case, *supra*, where this Court held at page 61:

> "Next appellant alleges that the trial court was in error when it quashed the *subpeona duces tecum* as to the Federal Bureau of Investigation report on his case. Appellant argues that at least the trial judge should have made an *in camera* inspection in order to see if a fair resume of the F.B.I. report had been sent to the appellant. We disagree. Appellant was given a resume of the report as required under the holding of United States v. Nugent, 1953, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417, and Simmons v. United States, 1955, 348 U.S. 397, 75 S.Ct. 397, 99 L.Ed. 453. Our decision in White v. United States, 9 Cir., 1954, 215 F. 2d 782, supra, and the Fourth Circuit's decision in Campbell v. United States, 4 Cir., 1955, 221 F. 2d 454, 460, are dispositive of the point.

A dictum of this Court in a later case indicates that it then considered the *White* and *Kaline* decisions as still binding on the District Courts in this Circuit.

(See footnote 4 on page 17 of the decision in *Clark* v. *United States*, 236 F. 2d 13 (9th Cir. 1956)).

The *White*, *Kaline* and *Clark* decisions of this Court were handed down before the decision of the United States Supreme Court in *Jencks* v. *United States*, 353 U.S. 657 (1957). But there is nothing in *Jencks* which mandates or even argues for a change in the rule established in *White*. The possible effect of the *Jencks* decision upon conscientious objector cases was analyzed by the Court of Appeals for the Fourth Circuit in *Alva Eugene Blalock* v. *United States*, which was decided on August 7, 1957. A copy of that opinion is printed as Appendix A of this brief. The holding of that court is a more convincing argument for the Government than its counsel could make.

V. CONCLUSION

Appellant was classified for noncombatant military service after protracted hearings before the draft authorities. He was afforded due process of law in all such proceedings and was therefore guilty of a violation of the Universal Military Training and Service Act in refusing to submit to induction after such classification. There was no error at the trial and the court below properly refused to require production of the original reports of the Federal Bureau of Investigation.

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney
Western District of Washington

JOSEPH C. McKINNON
Assistant United States Attorney
Attorneys for Appellee

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7435

Alva Eugene Blalock
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

(Argued June 3, 1957. Decided August 7, 1957.)

Before SOPER, SOBELOFF, AND HAYNSWORTH, Circuit Judges

Hayden C. Covington (Richard M. Welling on brief) for Appellant, and J. M. Baley, Jr., United States Attorney, (Hugh E. Monteith, Assistant United States Attorney, on brief) for Appellee.

SOBELOFF, Circuit Judge:

This appeal is from a conviction under an indictment charging a violation of the Universal Military

Training and Service Act. 50 U.S.C.A. Appendix[1] by refusing to submit to induction into the armed forces for non-combatant duty. At his trial, the defendant, Alva Eugene Blalock, challenged the appeal board's denial of his claim for 1-O conscientious objector classification, which would have immunized him from military service, both combatant and non-combatant. He also asserted that certain procedural rights were denied him in the course of the administrative process. These contentions are repeated here.

The appellant, a Jehovah's Witness, claims that, as a member of that sect and by personal conviction, he

1 The indictment is based on Section 462, the penalty section; but the procedural provisions to be considered are in Section 456 (j), 65 Stat. 83; and as we shall have occasion to consider several aspects of this section, it is here set forth in full:

(j) Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451 - 454 and 455 - 471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncom-

is conscientiously opposed to war and service in the armed forces. Since his original registration with Local Board No. 85 in Albemarle, North Carolina, in March, 1951, his relationship with the Selective Service System has been extensive. He has had a number of personal appearances before the local board, several appeals to the appeal board, and has undergone at least two F.B.I. investigations and hearings before Justice Department examiners.

In answering the questionnaire submitted by the local board, the appellant claimed exemption as an ordained minister of Jehovah's Witnesses and stated his objections to military service on grounds of conscience. He thereafter filed a special conscientious objector form and asserted, in addition, that he could not accept any appointment to do civilian work in the national interest, as is required by law of those exempted as conscientious objectors. He insisted that to obey this requirement would interfere with his service to God.

The board nevertheless classified him 1-A. A subsequent personal appearance in February, 1952, how-

batant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451 - 454 and 455 - 471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be found to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors. As amended June 19, 1951, c. 144, Title I, § 1 (l-q), 65 Stat. 83; June 30, 1955, c. 250, Title I, § 101, 69 Stat. 223; Aug. 9, 1955, c. 665, § 3(b)—(d), 69 Stat. 603.

ever, resulted in a III-A classification, since his mother, sister, and two brothers were dependent upon him for support.

The following year, in May, 1953, Blalock was reclassified 1-A by the local board[2]. Upon appeal to the appeal board, it made a preliminary determination that he was not entitled to a 1-O conscientious objector claim, and in accordance with the required procedure, his file was forwarded to the Department of Justice for investigation, hearing, and recommendation. Section 6 (j), 50 U.S.C.A. Appendix, Sec. 456 (j), 65 Stat. 83. As a result of these procedures, the Department recommended that the 1-O classification be granted. The resume of evidence, forwarded to the appeal board by the Department, pointed out favorable evidence gleaned from the investigation. The hearing examiner had been impressed with Blalock's demeanor, and concluded that he was devoutly religious and sincere in his opposition to war. With this recommendation before it, the appeal board granted the appellant a 1-O classification, which exempted him from all military duty, both combatant and non-combatant. However, he did thereby become subject to assignment to civilian work in the national interest. Sec. 6 (j).

When, later, Blalock refused to select between several alternatives of civilian work offered him, a meeting was called at which Colonel Mathis, a State Selective Service Officer, and the local board sought to reach an agreement with Blalock. At this interview, Mathis

2 The board thought the hardship conditions no longer existed to justify continuation of the III-A classification. This was apparently based upon various circumstances, such as that the registrant's mother was drawing Social Security benefits, his younger brothers and sisters had become old enough to assume part of the family's economic burden, assistance from older brothers and sisters was available to the family, and the loss of direct support from the registrant would be partly off-set by army allotments.

asked the registrant if he would work in a defense plant, and Blalock's reply was that he would, because the use made of the products "isn't my responsibility" and "is no concern of mine." In view of this admission, coupled with a declared intention not to perform any civilian work in the national interest if so ordered by the board, the State Director reopened the case. The local board reclassified him 1-A, and again the case was appealed and referred by the appeal board to the Department of Justice for investigation, hearing, and recommendation.

At the departmental hearing which followed, the examiner asked a question similar to that propounded at the earlier draft board interview pertaining to Blalock's willingness to work in a defense plant. He again answered that his religious beliefs would not prevent him from engaging in such work if it were necessary. Although the hearing officer recommended that the 1-O claim be sustained, the Special Assistant to the Attorney General, on review of the file, recommended denial of the claim in view of the registrant's statement that he would work in a defense plant. The recommendation, however, suggested that he be given a 1-AO classification, which would leave him eligible for military service but only in a non-combatant capacity.

Afforded an opportunity to reply to the Department's recommendation, Blalock altered his position regarding defense work, stating that he would not engage in such work if the materials were to be used in war. Thereupon, the appeal board, as the Department had suggested, classified appellant 1-AO, rendering him subject to non-combatant military service. On being ordered to report, he reported, but refused to submit to induction; and this criminal proceeding followed.

On at least several occasions during his draft board history, appellant made known his opposition to the political, material wars of men and nations, although he stated that he would kill in defense of himself and his brothers as authorized by God. In voicing this opposition, to the administrative officials before whom he appeared, he sought to persuade them that he could not, consistently with his religious views, maintain any position but a neutral one regarding earthly conflicts.

The success or failure of such attempted persuasions must, of course, in the last analysis, rest upon the board's judgment of the registrant's sincerity. Human experience has devised no precise gauge for appraising a subjective belief lodged in the mind and heart of the person himself and never truly known by others. Sincerity can be judged only from the individual's demeanor, the consistency of his statements, appraisals by persons to whom he is known, and other immeasurable factors which may be deemed significant by some men but not by others.

Not only could the appeal board consider the decision of the local board which had had an opportunity to view the registrant's demeanor, but it could determine and evaluate any incongruity in his condemnation of war on the one hand, and his willingness, on the other, to do defense work with avowed indifference to the destructive use of the products of his labor. Had Blalock actually worked in a defense plant, that circumstance would have been a pertinent one in evaluating the conscientiousness of his objection to non-combatant duty. *Jones* v. *United States*, 4 Cir., 241 F. 2d 704. His willingness to do so, though he has not in fact done so, is also pertinent. See *Witmer* v. *United States*,

348 U.S. 375. See also *Meredith* v. *United States*, 4 Cir., F. 2d , today decided. The Board could consider, in addition, that his attitude regarding defense work was later modified when the adverse effect of his admission became known to him.

The District Judge also pointed out certain variations in the several versions offered by the defendant of his medical history, which could have been interpreted by the fact finders as reflecting on his over all sincerity.

In a prosecution for refusing to submit to induction, the scope of judicial inquiry into the administrative proceedings leading to the defendant's classification is very limited. The range of review is the narrowest known to the law. *Campbell* v. *United States*, 4 Cir., 221 F. 2d 454. The "clearly erroneous" rule applied in equity appeals has no place here, nor even the "substantial evidence" rule of the Administrative Procedure Act. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Witmer* v. *United States*, 348 U.S. 375; *Goff* v. *U. S.*, 4 Cir., 135 F. 2d 610.

We cannot say that upon the record before the board there was no factual basis for the classification.

II

A ground for reversal, procedural in character, is also pressed. It relates to the production of the F.B.I. report on its investigation of the defendant.

As a special protection for conscientious objectors, it is, as we have seen, required by the Universal Mili-

tary Training and Service Act that whenever an appeal is taken from a local board's rejection of a claim for exemption based on conscientious objection, before acting upon the appeal the board must first refer the case to the Department of Justice for investigation, hearing, and recommendation. It becomes necessary now to consider this procedure more closely.

The agency that conducts the investigation for the Department is its Federal Bureau of Investigation, After a hearing, which is conducted, not by the F.B.I., but by a hearing officer, there follows a recommendation by still another department officer specially designated. The appeal board is required to consider, but it is not bound by, the recommendation. In accordance with the prevailing practice, the defendant was furnished a resume of the investigation. It revealed nothing new that was damaging or in dispute. He was, however, denied the basic F.B.I. records. The appeal board also received a resume, but not the F.B.I. records themselves, so that nothing was communicated to the appeal board beyond what was made known in identical language to the defendant. At the trial in the District Court, the defendant demanded that these records be produced for the Judge to determine the fairness and completeness of the resume. The Judge refused to inspect F.B.I. records and quashed the subpoena duces tecum.

It is argued that withholding this report from the appellant and from the appeal board was a denial to him of procedural fairness, in that he was unable to test the adequacy of the resume.

Relying on *United States* v. *Nugent*, 346 U.S. 1, and *United States* v. *Campbell*, 4 Cir., 221 F. 2d 454,

the District Judge ruled that the registrant is not entitled to a copy of the F.B.I. report, but only to the resume.

The defendant claims, however, that the nature of the evidence and the purpose for which he wishes to examine it are not the same here as in the Nugent case, and thus attempts to distinguish the two cases. He maintains that in Nugent, the registrant desired the F.B.I. report only to rebut the adverse evidence contained therein, whereas here the object is to determine whether the favorable evidence was fairly and adequately summarized for the appeal board. In our opinion, a distinction on this basis would be untenable. While this small dissimilarity between the two cases may be noted, it is not such as to put this case beyond the scope of the *Nugent* rule. Were we to adopt the suggested distinction, its inevitable result would be to entitle the registrant to the report in all cases. The summary, which the *Nugent* case declares is all that he is entitled to have, would thus become necessary, and the Supreme Court's deliberate differentiation between the resume and the full reports would be emptied of meaning. This differentiation was based upon the court's concept of the nature and purpose of the investigation and departmental procedure, for in denying Nugent the F.B.I. reports, the Supreme Court emphasized that Congress was not compelled to provide a Justice Department investigation auxiliary to the draft board procedures, and that in so doing, "it has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant." *United States* v. *Nugent*, 346 U.S. 1, 9.

It was pointed out in *Gonzales* v. *United States*, 348 U.S. 407, 412, that the statute itself does not, in terms, provide even for the resume, but this was read into the law by the Supreme Court so as to accord with "underlying concepts of procedural regularity and basic fair play," tempered, however, in light of the problems entailed in meeting "the imperative needs of mobilization and national vigilance—when there is no time for litigious interruption." *United States* v. *Nugent*, *supra*, p. 10.

In holding as we do, we are not unmindful of the recent decision in *Jencks* v. *United States*, 353 U.S. 657. For the reasons which we shall state, we conclude that it cannot govern this case. Though somewhat analogous, the two are not the same. In *Jencks* it was held that when a prosecution witness took the stand against an accused, the latter could demand to see any statements concerning him made to the F.B.I. by the witness, to ascertain whether or not they conflicted with the testimony given in court. The theory was that a defendant needs such information to determine whether the reports contain material for cross-examination.

The history of the treatment of F.B.I. reports, both in *Nugent* and in other cases, however, indicates the sharp distinction between applications by defendants in ordinary criminal cases to examine statements made to the F.B.I. by witnesses called to the stand by the Government, and demands for the production of such reports in conscientious objector cases. It is arguable that the resume furnished the accused in a Selective Service case is like a witness; that the resume should be subject to testing for fairness and completeness by a process similar to that applied to a witness

whose testimony may be impeached by showing prior conflicting statements. Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize. See *United States* v. *Evans*, 115 F. Supp. 340 (Hincks, J.) In *Simmons* v. *United States*, 348 U.S. 397, the point did not squarely arise, for there, without the necessity of looking at the original reports, it was obvious from the testimony in court that the summary was incomplete. The appellant argues however, that it does not follow in the absence of such testimony that the fairness of the report must be presumed. However plausible these contentions, we cannot accept them, for the point was considered and rejected in *Nugent*.

The Supreme Court has manifested its view that the investigation required under the Selective Service Act in cases of conscientious objectors is *sui generis*, and that production of reports of such investigations is not controlled by the rule applicable to criminal cases generally in respect to the use of prior conflicting statements to impeach witnesses. It is to be noted that the *Jencks* opinion makes no reference whatever to *Nugent*. No less noteworthy is the fact that when Chief Justice Vinson wrote for the Court in *Nugent*, he failed to mention his own opinion in *United States* v. *Reynolds*, 345 U.S. 1, written only three months before, in which it was recognized that in certain criminal cases, the right to see the F.B.I. reports would exist. Significant, also, is the fact that *Gordon* v. *United States*, 344 U.S. 414, decided one month before the Reynolds case, and which, like the Jencks case, dealt with the broad question of the right of a defendant to examine F.B.I. reports and to confront, on cross-ex-

amination, an adverse witness, was nowhere referred to in the *Nugent* decision.

These circumstances gain added meaning when we bear in mind that the *Nugent* decision, as explained by Mr. Justice Clark in *Simmons* v. *United States*, 348 U.S. 397, 403, "represented a balancing between the demands of an effective system for mobilizing the nation's manpower in times of crisis, and the demands of fairness toward the individual registrant." This very feature, which militates against a distinction between the present controversy and the *Nugent* case, suggests a distinction between those cases as a class and cases of which *Jencks* is representative.

Whatever may be the boundaries and limitations of the *Jencks* doctrine, we think it clear that it is subject to the qualification of the *Nugent* case for the type of problem here involved, that is, testing the accuracy of the resume furnished in conscientious objector cases, in contrast to impeachment of witnesses in criminal cases. The *Nugent* case explicitly holds that if the defendant was furnished a resume and accorded an opportunity to be heard, he cannot complain that he was not shown the investigative records, nor can he insist on their production at the criminal trial.

Rarely would a Court of Appeals be justified in declaring devitalized and no longer to be followed a Supreme Court decision passing directly on the precise point at issue, because of another decision of the Supreme Court in a related, though different area. The resolution of possible inconsistencies in the Supreme Court's decisions is ordinarily not the prerogative of inferior courts. *United States* v. *Ullmann*, 2 Cir., 221 F. 2d 760; cf. *Barnette* v. *West Virginia Board of Edu-*

cation, 47 F. Supp. 251, Parker Ch. J., affd. 319 U.S. 624.

While *Jencks* points in the direction of a freer access, in some circumstances at least, to F.B.I. files than the Court was willing to sanction in *Nugent*, it is not for us to extend the *Jencks* doctrine to penetrate the sphere in which the *Nugent* case unmistakably declared the applicable law. The holding in *Nugent* has not been retracted, and although the Supreme Court has several times been invited to reconsider the matter, it has declined to do so[3]. We hold, therefore, that the balance struck in *Nugent*, of affording the defendant a resume and not the original reports, governs here.

Affirmed.

3 This statement is supported by examination of the briefs filed by convicted defendants in support of petitions for certiorari in the following cases, in each of which the point was squarely raised: *Tomlinson* v. *United States*, 9 Cir., 216 F. 2d 12, cert. den. 348 U.S. 970, Oct. Term, 1954, No. 391; *White* v. *United States*, 9 Cir., 215 F. 2d 782, cert. den. 348 U.S. 970, Oct. Term. 1954, No. 390; *United States* v. *Simmons*, 7 Cir., 213 F. 2d 901, reversed, 348 U.S. 397, Oct. Term, 1954, No. 251; *United States* v. *Dal Santo*, 7 Cir., 205 F. 2d 429, cert. den. 346 U.S. 858. Oct. Term, 1953, No. 249.